On top of this the plaintiff was prepared to say, and did in fact say in evidence at the trial, that at a meeting between himself and the defendant in the presence of the Estate Manager, the defendant had admitted that the bus was not his property. That was later held to be untrue but that was his story. The evidential value of the registration was probably destroyed when the bus was re-registered in the name of the defendant on 13th October, 1958, and thereafter the only evidence to support the plaintiff's case as originally pleaded was evidence of what happened at the interview in the Estate office.

As I understand it, the gravamen of the Judge's complaint against the appellant is that the appellant did not sufficiently investigate this incident before proceeding to trial and in particular, that he did not insist on taking statements from the plaintiff's witnesses in view of the fact that since about 15th November, 1958, he had been in possession of the Estate Manager's affidavit which contradicted denying the plaintiff's own version of this interview.

Actually, of course, this complaint reduces to one of failing to interview a single witness out of 4 of the 5 witnesses who were called at the trial for only one of them professed to have been present at the interview. Nevertheless, as the Judge has pointed out, the evidence of that witness did not support the plaintiff and it may well be that the fact that it was not going to support the plaintiff might have been ascertained in advance.

For the life of me however, I cannot understand why it was not brought to the Judge's notice by the appellant that since 18th October, 1958, he had been in possession of an affidavit which had come into existence in the course of some interlocutory proceeding. That affidavit was made by a clerk in the Estate office and was to the effect that he was present at an interview between the parties in the presence of the Manager and that "during the discussion the defendant admitted that the said bus did not belong to him and he had no right to sell."

This witness was not called at the trial and we were told the reason for his not being called was that he had gone to India. Obviously, from the plaintiff's point of view he was a very valuable witness and it is highly probable that had he been available he would have been called. The point, however, is that had the existence of this affidavit been brought to the notice of Hepworth J., it is extremely unlikely that he would have proceeded to the length of taking punitive measures against the appellant. It would then have been clear that the appellant was not relying only on his client's bare statement but he also had this affidavit and although this did not excuse entirely his failure to take a statement from the witness who was in fact called to give evidence regarding the interview in my opinion it went a long way to palliate it.

It is very easy to be wise after the event but looking back, it is quite clear that the root of all the trouble that arose at the trial was the appellant's initial failure to appreciate the true nature of his client's case and his failure when he did appreciate to amend his pleadings. That case was that what was bought was the bus and the right to operate it on the Sembrong Estate. That might have been a good case or it might have been a bad case and I desire to say nothing that would suggest any doubt on my part as to the trial Judge's conclusion that it was a bad case. Unfortunately, however, it was pleaded in the wrong way and the result was that at the trial in an endeavour to solve a case which had already been hopelessly wrecked by the state of the pleadings, the appellant was forced to rely on his original version of his case which, although he had wished to abandon it, did not necessarily involve any attempt to mislead the Court. As far as he was concerned, he was entitled to believe his client particularly when he had seen the clerk's affidavit and to take the view that apart from the question of the right to operate the bus there was something peculiar about the state of the vehicle's ownership at the date of the issue of the writ when it was still registered in the name of Linggi Plantations. And here it must be recalled that until very shortly before that date the defendant himself was under the impression that the vehicle was mortgaged to Linggi Plantations Limited.

In all the circumstances of the case, I would allow the appeal. As however, the Order appealed against was not asked for by the defendant or by the appellant's client and neither of these parties have taken any part in the conduct of the appeal and as the appellant contributed in no small measure to his own misfortunes by his failure to amend the pleadings and at a later stage to bring the clerk's affidavit to the attention of the Judge, I would make no order as to costs.

Hill and Good JJ.A. concurred.

Appeal allowed.

Solicitors: *Mitra & Co.; Murugason & Co.*

LAI TAI v. THE COLLECTOR OF LAND REVENUE

[O. C. J. (Adams J.) March 7, 1960]

[K. L. — Originating Motion No. 3 of 1960]

Land laws — Land acquisition — What is reasonable enquiry to ascertain address of owner or occupier — Special circumstances for extending period of time for application to the Collector requiring him to refer the matter for the determination of the Court — Land Acquisition Enactment (Cap. 140), ss.12(ii) and 22(iv).

Constitutional Law — Rights of property — Constitution of Federation of Malaya, Art. 13.

The applicant was the registered proprietor of land which was required for use by the Government. In 1956 a declaration of intended acquisition under section 6(i) of the Land Acquisition Enactment was made in respect of it. The Notice Server did not find the occupier of the land and notice was not served upon the applicant in accordance with section 9(iv) of the Enactment. As the applicant did not appear at the hearing, an award

was made in her absence. The Notice Server was again unable to find the occupier and the applicant was accordingly not served with the notice of the award as required under section 12 of the Enactment. The applicant had no knowledge of the proceedings and in fact paid Quit Rent for the next three years. It was not until the Quit Rent for 1959 was tendered that the applicant was informed of the compulsory acquisition of her land and her Quit Rent was rejected.

By section 22 of the Enactment any person interested who has not accepted the award may, by written application to the Controller, require the matter to be referred by the Controller for the determination of the Court. There is a time limit imposed for making such application and in the present case the period for making application has long expired. However, section 22(iv) of the Enactment provides that the period is capable of enlargement by order of a Court in special circumstances. The issue before the Court was whether the applicant in this case was entitled to ask the Court to extend her period of making application to the Collector in accordance with section 22(iv).

Held: (1) the Notice Server failed to make reasonable inquiries to ascertain the address of the applicant as he did not make a diligent effort to do so, and this in itself was a special reason for enlarging the time in accordance with the provisions of section 22(iv);

(2) another reason for enlarging the time was the fact that the applicant was not informed of the compulsory acquisition of her land when she called at the land office to pay her quit rent within six months of the acquisition, although the Collector knew that she was unaware of the whole proceedings. If she had been informed she would still have been within the period allowed to her to apply for the matter to be referred to the Court.

Per Curiam: "It is a matter of natural justice that before property is taken compulsorily and compensation fixed, the owner should be made aware of the proceedings, where it is humanly possible to do so, so that he may be heard. The Enactment makes it quite clear that every reasonable effort should be taken to ensure that the owner and occupier are served with notice of the proceedings."

Cases referred to:—

(1) *International Financial Society* v. *City of Moscow Gas Co.* (1877), 7 Ch. D. 241, C.A.
(2) *Re Victoria, Ex parte the Spanish Corporation Ltd.* [1894] Ch. 259.
(3) *In re Helsby, Ex parte the Trustees* [1894] 1 Q.B. 743.
(4) *In re Coles & Ravenshear* [1907] 1 K.B. 5.
(5) *Chan Tai Tai* v. *Official Assignee* [1957] M.L.J. 54.
(6) *Re Boycott* 29 Ch. D. 571, C.A.
(7) *Re Norman* 19 Q.B.D. 673, C.A.
(8) *Re Cheesman* [1891] 2 Ch. D. 289, C.A.

APPLICATION by way of Originating Motion.

Chin Yoong Chong for the applicant.

Harun bin Hj. Idris (Sr. Federal Counsel) for the respondent.

Adams J.: This is an application by way of Originating Motion by the owner of a piece of land in the Pantai Valley of approximately 3 acres, 3 roods, and 03 poles held by her under Certificate of Title No. 4886, Lot No. 2533 in the Mukim of Kuala Lumpur (hereinafter referred to as the land) to extend the period of time to enable her to apply to the Collector requiring him that the matter of the compulsory acquisition of this piece of land be referred to the Court under the provisions of section 22 (iv) of the Land Acquisition Enactment (Cap. 140 F.M.S.) (hereinafter referred to as the Enactment).

Mr. Chin Yoong Chong appeared for the applicant and Inche Harun, Senior Federal Counsel, the Legal Adviser, Selangor, opposed the application on behalf of the Collector.

The facts are not in dispute and are set out in the Affidavit of Lai Tai (f), the applicant herein affirmed on the 26th of January, 1960, and the Affidavit of Michael Aldridge Kidner, the Collector of Land Revenue for the District of Kuala Lumpur, affirmed on the 20th of February, 1960, and the Affidavit of Che Abdul Rahman bin Mohd. Zain, a Notice Server in the Land Office at Kuala Lumpur affirmed on the 20th February, 1960.

The applicant is the registered proprietor of the land which is planted with rubber trees which had been bringing in an average monthly income of $200. The land was required for use by the Government and a declaration of intended acquisition under section 6(i) of the Enactment was made in respect to it. This declaration was published in the Selangor Gazette as Notification No. 173 on the 22nd of March, 1956. Notices under section 9(i) were posted on the land but as the Notice Server did not find the occupier of the land notice was not served upon her in accordance with the provisions of section 9(iv) of the Enactment. Instead he posted a further copy of the notice on the land and a further copy on the notice board at the Land Office in Kuala Lumpur. The hearing of the claims and objections to the acquisition of the land took place on the 15th June, 1956, in accordance with the terms of the notice. As the applicant did not appear, an award was made in her absence and a written offer of compensation in accordance with the provisions of section 43(i) was issued on the 26th November, 1956. The Notice Server deposed that he was unable to find the occupier of the land. Accordingly he again posted a copy of the notice of the award on the land and on the notice board of the Land Office. Later the amount of the award was deposited in Court under provisions of section 43(ii). It should be made clear that the applicant had no knowledge of any of these proceedings and in fact Quit Rent for the years 1956, 1957, and 1958, was paid by the applicant and accepted by the Collector in respect of the land. It was not until the Quit Rent for 1959 was tendered that the Collector through his clerk informed the applicant that the land had been compulsorily acquired. The Quit Rent was not accepted.

Section 22 of the Enactment makes provision that any person interested who, *inter alia*, has not accepted the award may by written application to the Collector, require that the matter be referred by the Collector for the determination of the Court. There is however a time limit imposed for making any such application:—

(a) If the person making it was present or represented before the Collector at the time when he made his award in which case it must be made within six weeks; or

(b) in other cases within six weeks of the receipt of the notice from the Collector under Section 12(ii) or within six months from the date of the Collector's award whichever period shall first expire.

It is quite clear that this period has now long passed, but section 22(iv) provides that the periods are capable of enlargement by order of a Court in special circumstances. The question therefore to be decided in this case is what constitutes special circumstances to enable the Court to enlarge the time to enable the applicant to take advantage of section 22 ?

James L.J. considering the question of extending the time for appealing under Order 58 of the Rules of Supreme Court of Judicature in England (as it stood before its alteration in 1910) in the case of the *International Financial Society* v. *City of Moscow Gas Co.*[1] said:

"The limitation of the time to appeal is a right given to the person in whose favour a Judge has decided. I think we ought not to enlarge that time unless under some very special circumstance indeed, that is to say, if there has been any misleading through any conduct of the other side, as was mentioned in the analogous case of vacating inrolment which came before Lord Cottenham, and afterwards before Lord Chelmsford, in which it was laid down that the right of the suitor was *ex debito justitiae* to keep his inrolment of the decree if it was made in due time, unless in very special cases. For instance, where there was anything like misleading on the part of the other side, or where some mistake had been made in the office itself, and a party was misled by an officer of the Court, or again, where some sudden accident which could not have been foreseen — some sudden death, or something of that kind, which accounted for the delay; in such cases leave might be given.

Two matters are clear from this judgment, firstly once an order has been made, the person in whose favour it was made has a vested interest in it which should not be lightly disturbed and secondly that the discretion given to the Court to enlarge the period prescribed by the general rules within which notice of appeal is to be given is not absolute where the rule requires "special leave" to be obtained or special circumstances to be established before such leave is given.

In *Re Victoria Ex Parte The Spanish Corporation Ltd.*,[2] at page 263, Lord Halsbury said:

"It would have been easy for the legislature to have said that, where no injustice resulted from non-compliance with rules as to appeals, compliance with them might be dispensed with. It has not done so in any way. It is thought right to give a criterion to guide the Court in the exercise of the discretion by saying that the appeal shall only be entertained if the rules had been complied with."

In the case of *In Re Helsby Ex Parte The Trustees*[3] the Court considered the effect of rule 130 of the Bankruptcy Rules 1886 which limited the period of time for appeal to the Court of Appeal to 21 days, subject to the powers of the Court of Appeal to extend the time under special circumstances. The Court adopted the view that a party has vested right in an order of Court in his favour and ought not to be deprived of an advantage given to him by the rules unless there has been on his part some conduct raising an equity against him or in the case of inevitable accident. This case was followed in *Re Coles and Ravenshear*,[4] which has also been followed by the Court of Appeal in the Federation of Malaya in the case of *Chan Tai Tai* v. *The Official Assignee.*[5]

I think that the principles enunciated in these cases can be properly applied to the present one. Once the Collector has observed the provisions provided by the Enactment, the Government has a vested interest in the award in the same way as the holder of a decree has in his decree. Therefore any enlargement of the time under section 22(iv) can only be given when there are special circumstances to justify it and that these special circumstances must be something more than mere hardship or inconvenience to the applicant.

Inche Harun pointed out that special circumstances are difficult to define and cited cases under section 37 and section 41 of the Solicitors Act 1843 (now repealed) which gave the Court power "in special circumstances" to order taxation of bills of costs. [*Re Boycott*[6]; and *Re Norman.*[7]] In *Re Cheesman*[8] Lindley L.J. summed the matter up saying:

"The Court has got out of the narrow groove laid down by some of the earlier cases, which decide that there must be pressure and overcharge, or overcharge so gross as to amount to fraud and it is now settled by *Re Boycott* and *Re Norman* that each case must stand on its own circumstances. The Court cannot lay down a hard and fast rule not imposed by the Act: it must be judged in each case whether there are special circumstances such as to make it right and reasonable that a bill should be taxed although it has been paid."

With this I most respectfully agree. It is impossible to lay down any definition of special circumstances. All that can be done is to look at the circumstances of each case and see whether the applicant was in any way to blame for her failure to apply to the Collector within proper time and if not whether the circumstances which prevented her from so doing were special and whether the respondent has by his behaviour raised any 'equity' against himself: that is to say contributed in any way to the causes which caused the applicant not to apply in due time.

In this connection the conduct of the Collector and his officials in relation to the provisions of the Enactment must be examined.

The Land Acquisition Enactment requires by section 9 that notice of the intention to acquire (a) shall be posted on the land, and (b) shall be served upon the occupier. In this case the occupier was not served. There is no provision in the Enactment for serving the notice required by section 9(iv) by affixing it on the land. Personal service on the occupier is mandatory

and the method of service is prescribed in the sub-section. This was not done, but by virtue of the proviso to the sub-section this irregularity does not invalidate the acquisition.

Section 12(ii) requires that a copy of the award under section 11 shall be served on all persons interested provided that their addresses can be ascertained after reasonable enquiry when the award is made. All that the Affidavit of the Notice Server says is that he tried to find the registered proprietor and made various enquiries to that end without success. He does not say what enquiries he made or when he made them nor did he say at what time he visited the land which it will be remembered was rubber land in bearing nor did he say where he affixed the notice under section 9(i). It is obvious in paragraph 2 of the applicant's Affidavit that the land was producing rubber at that time. Quit rent was paid and accepted for the land for the years 1956, 1957 and 1958 and the applicant would scarcely have paid this were she not in active occupation of the land. I cannot believe that the Notice Server made reasonable enquiries as required by section 12(ii) to ascertain the address of persons who may be interested in the award. Had he visited the land at the time the trees were being tapped or the latex was being collected he must have been able to ascertain the address of the owner of the land. Nor do I consider that one visit to the land to fix the notice required by section 9(i) and one visit to the land with the copy of the award under section 11, is making "reasonable" enquiry within the meaning of section 12. "Reasonable" in this context clearly means "diligent". Article 13 of the Constitution of the Federation of Malaya demands that no person shall be deprived of his property except in accordance with the law. It is essential that the intention as well as the provisions of the enactment be observed. It is a matter of natural justice that before property is taken compulsorily and compensation fixed, the owner should be made aware of the proceedings, where it is humanly possible to do so, so that he may be heard. The Enactment makes it quite clear that every reasonable effort should be taken to ensure that the owner and occupier are served with notice of the proceedings. I am not satisfied that the Notice Server made reasonable enquiries in this case to ascertain the address of the owner or occupier and I consider that that in itself is a special reason for enlarging the time in accordance with the provisions of section 22(iv). In addition to this, although the hearing was conducted on the 15th June 1956 and the award issued on the 26th November, 1956, Quit Rent (for which the applicant was liable because the Government had not and still has not taken possession of the land) was paid in due time and accepted for the years 1956, 1957 and 1958 yet no mention was made by the Land Office officials that the land had been compulsorily acquired. Had they done so, when the Quit Rent was paid for 1956 the applicant would still have been within the period provided by the Enactment for her to apply under Section 22 to have the matter referred to the Court.

On the facts of this case I am satisfied that there are special reasons for enlarging the time under section 22 of the Enactment:

(a) The Applicant was not served either with the Notice of the intention to acquire under section 9 or of Notice of the award under section 12 although had the notice server made diligent enquiries he certainly could have ascertained the address of the occupier because the land was rubber land in bearing;

and (b) That although the applicant called at the land office to pay her quit rent for 1956 within the six months she was not told that the land had been acquired although the Collector knew that she was unaware of the proceedings under the enactment in respect of the land.

These two factors in my opinion entitle the applicant to ask for the indulgence of the Court to ask that she may be relieved from the legal bar imposed by section 22 of the Enactment. I therefore allow the application with costs.

Application allowed.

Solicitors: *Bannon & Bailey.*

THE OFFICIAL ASSIGNEE v. EK LIONG HIN LTD.

[J. C. (Lord Denning, Lord Jenkins and the Rt. Hon. L. M. D. de Silva) January 14, 1960]

[Privy Council Appeal No. 8 of 1959]

Money and Moneylending — Loans on security of goods by firm whose principal business was as ship-owners, warehousemen, rubber dealers, etc. — "Carrying on business not having for his primary object the lending of money" — Moneylenders Ordinance (Cap. 193), ss.2(d) and 5(1).

The respondent company carried on the primary business of rubber merchants and shippers and had storage facilities there for storage of goods. They also made loans to their customers on the security of goods stored in their warehouses. They did not advertise the fact that they were willing to lend money and they had no separate moneylending business. A firm, to whom the company had lent money, got into financial difficulties and the company sold the goods deposited in their warehouses as security, crediting the proceeds against the loan. The firm became bankrupt and the Official Assignee claimed the value of the goods sold, alleging that the company were moneylenders within the Moneylenders Ordinance and admittedly had not complied with the provisions of that Ordinance.

Held: (1) the words "for the purposes whereof he lends money" in clause (d) of the exceptions to the definition of a "moneylender" in section 2 of the Moneylenders Ordinance do not indicate that the money lent must be shown to have been lent for the purposes of the primary objects of the business. The word "whereof" refers to the business and not to the primary